No. 83-903

Office - Supreme Court, U.S.
FILED
NOV 15 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

-vs-

GABRIEL BRIGUGLIO,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN H. GIFIS
ALAN DEXTER BOWMAN
20 Nassau Street, Suite 203
Princeton, New Jersey 08542
(609) 921-0413

Attorneys for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

Questions Presented

1. Whether an Attorney's Knowing Status As The Target Of A Federal Grand Jury Investigation In The Same Federal District As the Criminal Trial Is An Actual Conflict Which Must Be Disclosed to The Client.

2. Whether In Light Of Cuyler v. Sullivan, a Multiple Representation Case, A Criminal Defendant Seeking A New Trial On Appeal Because Of His Trial Counsel's Previously Unobjected To, Concealed Personal Conflict Must Demonstrate That The Conflict Adversely Affected The Representation.

3. Whether a Prosecutor Has A Duty To Disclose To The Court That Trial Counsel Is A Target Of An Investigation By the Prosecutor's Office And Concomitantly Whether the Trial Court Upon Being Informed Has A Duty To Inquire As To Whether The Conflict And Potential for intimidation Have Been Disclosed To The Defendant.

4. Whether The Decision Of The Prosecutor Not to Engage In Particular Plea Negotiations With Counsel Due To His Status Gave Rise To An Actual Conflict Which Adversely Affected The Representation Afforded Petitioner.

TABLE OF CONTENTS

PAGE

Questions Presented.....i

Opinion Below.....1

Jurisdiction.....1

Constitution, Statutory And Rule Provisions Involved.....2

Statement Of The Case.....2

a. Factual Background.....2

i. The Jurisprudential Significance Of The Arguments To Be Raised Before This Court.....5

Reasons For Granting The Writ.....8

POINT I CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE AS TO WHETHER AN ATTORNEY'S KNOWING STTUS AS THE TARGET OF A GRAND JURY INVESTIGATION IN THE SAME DISTRICT AS TRIAL IS AN ACTUAL CONFLICT WHICH MUST BE DISCLOSED TO THE CLIENT. THIS COURT SHOULD ALSO DETERMINE WHETHER THE PROSECUTOR AND THE COURT HAVE AFFIRMATIVE DUTIES OF INQUIRY AS TO WHETHER THE CONFLICT WAS DISCLOSED IN CIRCUMSTANCES WHERE THEY ARE AWARE OF THE TARGET STATUS OF DEFENSE COUNSEL. AS IMPORTANTLY, THIS COURT MUST DETERMINE WHETHER THE PROSECUTOR'S DISCRIMINATION AGAINST COUNSEL WITH RESPECT TO PLEA NEGOTIATIONS ALTERNATIVES SUFFICIENTLY EVIDENCED AN ACTUAL CONFLICT IN THIS CASE AND CONSTITUTED AN ADVERSE AFFECT ON THE REPRESENTATION AFFORDED PETITIONER.....9

i. Present Laws As To Conflict.13

a. Holloway v. Arkansas - The Seminal Articulation Of Modern Conflicts Law.....13

b. Cuyler v. Sullivan - The Court Resolves The Issues Left Unanswered In Holloway v. Arkansas.....14

c. Wood v. George - The Most Recent Statement Of This Court.....18

ii. Counsel Labored Under An Actual Conflict Of Interest.....20

iii. Although No Adverse Affect Need Be Demonstrated It Is Clear That The Conflict Adversely Affected The Representation.....22

CONCLUSION.....25

CASES CITED

CUYLER V. SULLIVAN, 466 U.S. 334 (1980).....passim

GLASSER V. UNITED STATES, 315 U.S. 60 (1942).....13,14

HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978).....13,14,15

MOORE V. UNITED STATES, 432 F.2d 730 (3 Cir. 1970).....12

UNITED STATES V. CHRONIC, 675 F.2d 1126 (10 cir. 1982), cert. gr. 103 S.Ct. 1182 (1983).....22

UNITED STATES V. LAURA, 667 F.2d 365
(3 cir. 1981).....23

WOOD V. GEORGE, 450 U.S. 261, 101
S.Ct. 1097 (1981).....18,19,20

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

VS.

GABRIEL BRIGUGLIO,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 17 , 1983.

Opinion Below

The Judgement Order Of the United States Court Of Appeals for the Third Circuit is appended to this Petition as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. §1254)

Constitution, Statutory And Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Fifth and Sixth Amendments to the United States Constitution. They are appended to this Petition as Appendix B.

STATEMENT OF THE CASE

a. Factual Background

In February of 1979, Thomas DiBiasi assumed representation of petitioner in a federal criminal matter in the district of New Jersey. (T.6-1 to 3). Thereafter, in March of 1979 DiBiasi was issued a subpoena duces tecum to appear and produce documents before a federal grand jury in the district of New Jersey. (T.247-2 to 10). DiBiasi traveled to the federal courthouse on April 10, 1979 in possession of documents with the intention to testify. (T.247-22 to 248-8). Upon his arrival, DiBiasi was informed by Assistant United States Attorney Richard Friedman that he might want to reconsider his decision to testify. The basis for Friedman's statement was the necessity that he warn DiBiasi

that he (DiBiasi) was a target of the grand jury. (T.247-22 to 248-8). In response, DiBiasi gave Friedman the documents covered by the subpeona and decided against testifying. (T.248-11 to 15; T.265-20 to 21).

Friedman informed Jeffrey Speiser, the trial prosecutor, that DiBiasi had been advised that he was a target of a federal grand jury investigation in the same district as trial. Speiser did not at this point inform the court of DiBiasi's status. (T.1136-12 to 21; T.138-14 to 13). Trial commenced on May 7, 1979. One week later, on a day in which trial was continuing, DiBiasi telephoned Friedman to arrange an appointment to see him. (T.251-4 to 7). The purpose of the meeting was to discuss DiBiasi's status within the ongoing investigation. (T.251-5 to 7). Friedman informed DiBiasi that no action would be taken by the grand jury until after petitioner's trial. At that time, DiBiasi would be permitted to present evidence to the grand jury. (T.251-9 to 13).

At other points during the trial, DiBiasi manifested further concern and anxiety respecting his status within the investigation. He approached Speiser and stated that he (DiBiasi) particularly understood the stress under which the defendants were laboring at trial because he too was an adversary of the government in his personal capacity.

DiBiasi then indicated that he was aware that Speiser knew of his status. (T.204-19 to 205-1). Similarly, DiBiasi intimated to petitioner's wife that he understood her anxiety and that of her family because he too might soon be indicted. However, DiBiasi retracted that comment stating that he was joking. (T.275-5 to 12; T.277-4 to 6). This last comment was in response to an inquiry by petitioner's wife as to whether counsel might be experiencing personal problems which were causing a clear dimunition of his zeal.

Although evidence was adduced which could be viewed as implicating petitioner in the conspiracy, particularly two checks and a letter written by petitioner's brother to the government's chief witness, DiBiasi did not present any defense in petitioner's behalf. Petitioner, who had no prior criminal record, was dissuaded from testifying on the basis of erroneous legal advice and assurances that insufficient evidence had been adduced to convict him. DiBiasi incorrectly advised petitioner that questions could be posited to him respecting the disappearance of Jimmy Hoffa. Similarly, no character witnesses were adduced allegedly because of the same fear. (T.296-10 to 300-3; T.79-7 to 10). No ruling was sought from the court respecting the admissibility of any questions concerning the unsolved disappearance of Jimmy Hoffa.

During jury deliberations, DiBiasi requested that plea negotiations be conducted in the court's chambers, in the presence of the court. (T.49-10 to 15). Such negotiations were inconsistent with assurances made to petitioner that there was insufficient evidence to convict him. DiBiasi sought an agreement from the government to accept a plea without an acknowledgement of guilt. These negotiations terminated without an agreement. Subsequent to DiBiasi's departure from the judge's chambers, Speiser informed the court that DiBiasi was a target of the grand jury. (T.150-7 to 8). Speiser further stated that no plea without an acknowledgement of guilt would be accepted from a client represented by DiBiasi because questions as to its validity might be raised if DiBiasi was ultimately indicted.

During June of 1979 DiBiasi again presented documents to the grand jury. (T.249-12 to 16). At that time, DiBiasi had secured counsel to represent him. In July of 1979, DiBiasi represented petitioner at sentencing. In August of 1979, DiBiasi was indicted. He was severed from the trial of his codefendants. Petitioner's name was mentioned in that trial. In December of 1980, DiBiasi pleaded guilty to a lesser charge.

ii.

The Jurisprudential Significance Of The Arguments To Be Raised Before This Court

Petitioner has selected a single issue to be raised before this Court. The issue relates to the failure of counsel and/or the prosecutor to disclose to petitioner that defense counsel was a target of a Federal Grand Jury investigation in the same Federal district as the trial and the adverse effect upon the representation which counsel afforded as the result of this status. It is petitioner's position that this status constituted an impermissible conflict, absent disclosure and a waiver of the right to conflict-free counsel. We believe that this issue has national significance in the context of the development of fair and uniform trial procedures designed to ensure the integrity of verdicts in criminal cases.

There exists a precedential void respecting the disclosure obligations of the criminal bar where a member thereof becomes aware that he is a target of a grand jury investigation and, therefore, under an investigation by a law enforcement agency with which he may be required to deal on behalf of a client. The majority of cases analyzing conflicts of interest have arisen in the context of multiple representation cases or in circumstances where the personal conflict of the attorney stems from a pecuniary interest in the ultimate disposition of the matter. Guidance to the bar as to the level of constitutionally required disclosure, where

an attorney is called upon to try a criminal cause in a federal district in which he is the knowing target of a grand jury investigation, is an issue ripe for determination by this Court. This question should not be resolved by experimentation. A criminal defendant has no means to perceive such a conflict absent voluntary disclosure by counsel. As was demonstrated below, "target status" clearly has the capacity to render an advocate ineffective because of his concern for his personal interest. It also raises the spectre of improper influence and intimidation by the prosecutor. Absent disclosure to the client and a knowing decision to proceed, which would effect a waiver of the right to conflict-free counsel, the air of uncertainty as to the loyalty of counsel renders any actions which he takes suspect. Because a criminal defendant will not discover the conflict until his cause has been t. ed, trials may be nullified because no clear rule of disclosure has been fashioned.

As importantly, this Court should fashion a rule of conduct pertaining to the obligations of a procecutorial agency where it is actively investigating an attorney who is involved in the trial of a criminal matter which falls within the jurisdiction of the agency. The prosecutorial agency involved in the instant case affirmatively limited the options available to petitioner in plea negotiations due to his

counsel's status. In Cuyler v. Sullivan, 466 U.S. 334 (1980), the inquiry obligations of the trial court and its general supervisory responsibilities in the context of multiple representation cases was settled. Sullivan also answered the issue as to the level of prejudice necessary to underpin the granting of a new trial on appeal where a criminal defendant fails to object to a conflict stemming from multiple representation at trial. The principles of analysis utilized in Cuyler are ripe for application to conflicts of the type in the instant case.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE AS TO WHETHER AN ATTORNEY'S KNOWING STATUS AS THE TARGET OF A GRAND JURY INVESTIGATION IN THE SAME DISTRICT AS TRIAL IS AN ACTUAL CONFLICT WHICH MUST BE DISCLOSED TO THE CLIENT. THIS COURT SHOULD ALSO DETERMINE WHETHER THE PROESCUTOR AND THE COURT HAVE AFFIRMATIVE DUTIES OF INQUIRY AS TO WHETHER THE CONFLICT WAS DISCLOSED IN CIRCUMSTANCES WHERE THEY ARE AWARE OF

THE TARGET STATUS OF DEFENSE COUNSEL. AS IMPORTANTLY, THIS COURT MUST DETERMINE WHETHER THE PROSECUTOR'S DISCRIMINATION AGAINST COUNSEL WITH RESPECT TO PLEA NEGOTIATION ALTERNATIVES SUFFICIENTLY EVIDENCED AN ACTUAL CONFLICT IN THIS CASE AND CONSTITUTED AN ADVERSE AFFECT ON THE REPRESENTATION AFFORDED PETITIONER

Facts adduced at the evidentiary hearing below indicate that counsel at trial labored under a debilitating conflict of interest which was not disclosed to petitioner. Counsel became aware sufficiently in advance of trial to facilitate notice or withdrawal from the case that he was the target of a federal grand jury investigation in the same federal district as that in which trial was to occur. In fact, counsel was issued a grand jury subpoena substantially in advance of trial. Pursuant to that subpoena, counsel produced documents and intended to testify before the grand jury. Counsel was dissuaded from testifying by the Assistant United States Attorney who supervised the grand jury. The Assistant United States Attorney issued target warnings to counsel and suggested that he reconsider his decision to

testify. Counsel clearly surmised prior to trial that he would subsequently be indicted. Counsel also concluded prior to trial that the most prudent course was withdrawal from the case. Nevertheless, he remained in the case and did not disclose the conflict. Subsequent to trial, counsel by affidavit advised the court that he had not been able to give his undivided attention to defense of petitioner's cause. In addition, both the trial prosecutor and the court were aware at some point during counsel's representation of petitioner that counsel knew that he was a target of a grand jury sitting within the same office complex as trial and administered by the same United States Attorney's Office as that conducting trial. Neither the trial prosecutor nor the court undertook to ascertain whether counsel disclosed his problems and the debilitating emotional and psychological effects thereof. Indeed, no concern whatsoever was expressed relative to the detriment to petitioner.

As importantly, at least one Assistant United States Attorney was aware that during trial counsel made attempts to discuss his status within the grand jury investigation. Simply put, during trial counsel assumed dual roles in dealing with the United States Attorney as both advocate for petitioner and his own cause. Those separate interests were conflicting and deprived petitioner of counsel's

undivided attention and loyalty. Of greater significance is the admission of the trial prosecutor both in an affidavit and at the reluctantly conducted evidentiary hearing that a particular form of plea agreement, viz. a plea without an admission of guilt, would not be considered for petitioner because of his counsel's target status. The prosecutor expressed a concern that questions might thereafter arise as to the validity of the plea in the event that counsel was subsequently indicted. The demonstration of conflict and adverse affect upon representation could not be more clearly established than in this case.

It is our position that petitioner, due to concealment of the conflict, was deprived of his inter-related rights to conflict-free counsel and effective assistance of counsel. Both the prosecutor and trial counsel participated in denial to petitioner of an opportunity to exercise an intelligent choice in the selection of counsel. The general right to counsel incorporates the right to choose counsel with knowledge of all relevant information. Disclosure of all relevant information permits effectuation of the right to conflict-free counsel. Although counsel and the prosecutor were aware of counsel's status and should have perceived the pitfalls, no action was taken to advise petitioner to enable him to determine whether he was willing to accept the risks

of representation by conflicted counsel. During the course of trial, the court also became aware that a conflict of counsel interfered with his ability to provided untrammelled representation, viz. abridgement of his plea options. The court was obligated to immediately determine whether appellant had accepted counsel's representation with knoweledge that he risked prejudice due to counsel's status. Absent a waiver based on intelligent and informed acceptance of the risks, we submit that it must be presumed that appellant did not receive effective assistance of counsel. We believe that counsel is per se incompetent where he fails to disclose an actual conflict to his client which is not discoverable by independent means. Simply put, the exercise of customary skill requires that counsel recognize and resolve any personal conflict prior to assuming representation of his client.

In an opinion affirmed by the Third Circuit, the district court ruled that a claim of constitutional violation predicated on the non-disclosure of an actual conflict is to be analyzed uner the principles set forth in Cuyler v. Sullivan, 446 U.S. 334 (1980), viz. a demonstration of an actual conflict of interest and an adverse affect on the representation. That court stated that no actual conflict was demonstrated nor any adverse affect on the representation.

The district court then stated that in the absence of an actual conflict, petitioner's claims must be claim is analyzed under the standard set forth in **Moore v. United States, 432 F.2d 730 (3 Cir. 1970)**. More specifically, the district court stated that to prevail petitioner was required to demonstrate that counsel did not exhibit customary skill in the representation which he provided. Resolution of petitioner's claims is dependent upon further analysis by this Court of its decisions in **Cuyler** and **Wood v. Georgia, 450 U.S. 261 (1981)**. Particularly, this Court must fashion guidelines to be applied by courts in assessing whether a circumstance presents an actual conflict.

i.

Present Law As To Conflicts

a. **Holloway v. Arkansas - The Seminal Articulation Of Modern Conflicts Law**

The law in the area of conflicting interests evolved from cases involving joint representation of multiple defendants. In **Holloway v. Arkansas, 435 U.S. 475 (1978)**, this Court considered a case in which appointed counsel was required over objection to represent three criminal defendants in a joint trial trial. Relying on **Glasser v. United States, 315 U.S. 60 (1942)**, the **Holloway** Court began its analysis by stating that multiple representation is not per

se violative of the constitutional guarantee of effective assistance of counsel. That predicate statement was based on an awareness that multiple representation is not always a conflict and, in fact, may be beneficial to a common defense. 435 U.S. supra at 482. However, again specifically relying on Glasser, the Holloway Court ruled that it was error in the case before it to fail to appoint separate counsel over the objections of the defendants and counsel's statements that multiple representation was imprudent. In answering the question as to whether the error was sufficiently prejudicial to mandate reversal of the convictions, the Holloway Court ruled that "whenever a trial court improperly requires joint representation over timely objection, reversal is automatic." 435 U.S. at 488. (emphasis added). The Holloway Court rejected any notion that the defendant be required to demonstrate specific prejudice. Any such rule, stated the Holloway Court, "would not be susceptible of intelligent, even-handed application." 435 U.S. at 490. The Holloway Court added: "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." (emphasis added).

b. Cuyler v. Sullivan - This Court Resolves The Issues Left Unanswered In Holloway v. Arkansas

This Court granted certiorari in Cuyler to consider recurring issues left unresolved in Holloway v. Arkansas, supra. Those unresolved issues were: (1) whether a trial judge must inquire into the propriety of multiple representation even though no party lodges an objection and (2) whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel. With respect to the first issue, viz. the responsibility of the trial court to initiate an inquiry into the propriety of multiple representation, the Cuyler Court stated that a trial court ordinarily has no such responsibility. 466 U.S. at 346. The Court stated that "defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." id. (emphasis added). Accordingly, "absent special circumstances...trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 466 U.S. at 347. (emphasis added). The rule fashioned by the Cuyler Court is that "unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Id.

With regard to the second issue, viz. whether the mere possibility of prejudice or conflict of interest due to multiple representation denies the defendant his Sixth Amendment right to effective counsel, the Cuyler Court undertook a multi-faceted analysis. The Cuyler Court observed that "a possible conflict inheres in almost every instance of multiple representation [and] a defendant who objects...must have the opportunity to show tht potential conflicts impermissibly imperil his right to a fair trial." 446 U.S. at 348. In regard to a presumption of prejudice, the Court stated:

> ...unless the trial court fails to afford such an opportunity [to show danger to the right to a fair trial] a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where a common defense...gives strength against a common attack. [466 U.S. at 348]

It is apparent that the Cuyler Court was concerned that a presumption of prejudice would give rise to a proliferation of tactical decisions to fail to object at trial and, in the event of a conviction, to raise the issue on

appeal. And, since there is always a possible conflict, the utility of multiple representation would be completely nullified. To thwart this tactic, the Cuyler Court ruled that "in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial [to multiple representation] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 466 U.S. at 348. The Cuyler Court was careful to state that it was not constructing a rule which required a demonstration of prejudice. The Court stated:

> [Once it is established that counsel] hd an actual conflict of interest, [courts will not] indulge in nice calculations as to the amount of prejudice attributable to the conflict...[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. [466 U.S. at 349-350] (emphasis added)

The rule in Cuyler, therefore, is that a defendant who fails to object to multiple representation at trial must demonstrate an actual conflict on appeal. Upon a demonstration of an actual conflct adversely affecting the

lawyer's performance, prejudice requiring reversal has been established. We emphasize that Cuyler did not analyze concealed personal conflicts such as that in the instant case.

c. Wood v. George - The Most Recent Statement Of This Court

In Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981), this Court granted certiorari to consider the question of "whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines." lol S.Ct. 1100. The Court in Wood was concerned about aspects of the nature of the legal representation provided to petitioners. More specifically, the Court stated that the record suggested that the petitioners may be in their present predicament because of their counsel's divided loyalties. Petitioners in Wood had been represented since the time of their arrests by a single lawyer, including all parole and probation revocation hearings. None of them, however, paid nor expected to pay a fee. The employer of the petitioner provided the lawyer and also agreed that he would pay any fines and post any necessary bonds. Moreover, it was fairly apparent that heavier fines were imposed on petitioners because the trial court anticipated that the employer would be making payment. 101 S.Ct. at 1103. With respect to the

fines at issue, however, the employer failed to pay. Id. None of the petitioners had objected to the multiple representation. Sua sponte, the Wood Court observed:

> Since it was this decision by the employer [to refuse to pay] that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer, the risk of conflict of interest in this situation is evident. [101 S.Ct. at 1101]

In reaching its decision, the Wood Court expanded upon an issue present in Cuyler, namely the circumstances under which a court must inquire into potential conflicts. The Court stated that "the possibility of a conflict of interest was sufficiently apparent at the time of the [parole] revocation hearing to impose upon the court a duty to inquire further." [101 S.Ct. at 1104][1] The Wood Court vacated the judgment and remanded the case on due process grounds. Id. The Court utilized the due process clause because it was of the view that representation by conflicted counsel violated the petitioner's due process rights respecting the parole and probation hearing. The Wood Court instructed

---

The Wood Court stated "[Cuyler] mandates reversal when the trial court has failed to make an inquiry" in such circumstances. 101 S.Ct. at 1104.

the state court "to hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier." Id.[2] The Court further stated:

> If the Court finds that an actual conflict existed at that time and that there was no valid waiver of the right to independent counsel, it must hold a revocation hearing tht is untainted by a legal representation serving conflicting interests. [101 S.Ct. at 1104] (emphasis added)

Under any reasonable interpretation of Wood, the law is presently that a demonstration of an actual conflict of interest and the lack of a waiver requires vacation of a conviction and new proceedings with conflict-free counsel.

ii

Counsel Labored Under An Actual Conflict Of Interest

The district court found that counsel was not laboring under a conflict of interest of the sort which must be disclosed to a client. The finding that no conflict existed

---

[2] The possible conflict identified by the Wood Court was that it appeared that "counsel had been provided by [the] employer and was pressing a constitutional attack rather than making the arguments for leniency that might well hve resulted in substantial reductions in, or deferrals of, the fines." 101 S.Ct. at 1104. (emphasis added).

was reached despite the court's awareness that counsel filed an affidavit immediately after the trial stating that his concentration was divided at trial and that he realized prior to trial that he would not be able to provide zeal for petitioner's cause but decided against withdrawal. The district court also discounted unrefuted evidence that during trial counsel approached the prosecutor who supervised the grand jury investigation to discuss his status within that investigation. Most importantly, the court's decision was reached despite the district court's awareness that the trial prosecutor testified at the hearing that he would not consider a particular plea arrangement due to counsel's status. Indisputably, the total circumstances depict a conflict of the sort which is clearly constitutionally intolerable absent a waiver.

The actual conflict of interest of the sort herein was required to be disclosed to the client. Petitioner was deprived of a dynamic disputant. Counsel was hampered in his ability to represent petitioner both due to emotional and psychological factors and the prosecutor's unwillingness to deal with him due to his status. This fact, viz. the prosecutor's restriction of counsel's alternatives due to his status, establishes a clearly egregious conflict. Any position to the contrary is irrational.

iii.

Although No Adverse Affect Need Be Demonstrated It Is Clear That The Conflict Adversely Affected The Representation

The district court erroneously ruled that petitioner was required to demonstrate both an actual conflict and an adverse affect on the representation which he received. Appellant in our view was merely required to demonstrate an actual conflict. The court then ruled that even assuming the existence of an actual conflict it did not adversely affect the representation appellant received. At the outset, we emphasize that the difficult form of calculation required to determine prejudice or adverse affect gave rise to the rule in **Holloway** that upon demonstration of an actual conflict, no prejudice need be demonstrated. Such calculations are wholly insusceptible to evenhanded application. In this context, we iterate tht the "adverse affect" rule in **Cuyler** relates exclusively to claims raised subsequent to objected to acquiescence in multiple representation and is intended to prevent abuse of the appeal process. In cases where counsel conceals a personal conflict, no adverse effect need be demonstrated. As is clear from the discussion below, it is virtually impossible to quantify adverse affect in the instant context and any rule requiring such would be unworkable.

Nevertheless, it is clear that an adverse affect inhered in this case. Cf. United States v. Chronic, 675 F.2d 1126 (10 Cir. 1982), cert. gr. 103 S.Ct. 1182 (1983).

Notwithstanding the trial prosecutor's admission at the hearing tht he discriminated against counsel because of counsel's status, the court ruled that no adverse affect inhered. In essence, the district court predicated its ruling on its view that under no circumstances would a plea without an acknowledgement of guilt have been accepted. The basic reason for this position is that the court during its eight year tenure has never accepted such a plea nor had it "heard of such a plea in this district." The district court, in an attempt to fashion a negative ruling at any cost, basically determined that the prosecutor could not have committed the act of discrimination to which he admitted. It bears repeating that the Court in Holloway specifically sought to condemn this form of plainly inadequate analysis in fashioning the rule that no prejudice need be demonstrated in conflict cases. See United States v. Laura, 667 F.2d 365, 375 (3 Cir. 1981) (Stern, District Judge, dissenting). And, for analytical purposes, there is essentially no distinction between "adverse affect" and prejudice in cases involving concealed conflicts of a personal nature.

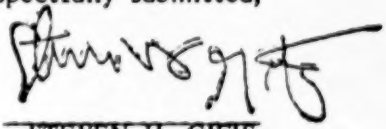
This Court in Cuyler intended that the "adverse affect" rule in multiple representation cases relate only to defendants who failed to object to a situation inherently fraught with potential conflicts and to situations within that form of representation such as the inability of counsel to cross-examine a particular witness as the result of a conflict in his representation of multiple defendants. The conflict and the adverse affect are in the inability to question the witness. The defendant need not demonstrate that he was harmed by the inability. Simply put, he need not establish that the witness' testimony would have materially aided his cause. He must merely demonstrate counsel's conflict and its concomitant adverse limitation of his alternatives.

In the instant case, the prosecutor has conceded that he limited counsel's alternatives in his representation of petitioner because of counsel's status. Counsel was, therefore, hobbled. Any such limitation, when it is unbeknownst to the appellant is an adverse affect on the representation. The defendant need not demonstrate that the form of disability resulted in prejudice. In the particular form of disability within the case we need not even undertake the adverse affect analysis since, unlike in multiple representation, petitioner was not alerted to the potential for conflict and had no opportunity to object.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit. That judgement should be vacated and a new trial ordered.

Respectfully submitted,



BY: STEVEN H. GIFIS

BY: ALAN DEXTER BOWMAN

DATED: November 14, 1983

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5624

UNITED STATES OF AMERICA

V.

GABRIEL BRIGUGLIO,

Appellant

(Criminal 79-72-04 - D.N.J. - Newark)

District Judge: Honorable H. Curtis Meanor

Argued July 15, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judges, and LORD, District Judge.*

JUDGMENT ORDER

After consideration of the contention raised by appellant, to-wit, that the undisclosed actual conflict affecting trial counsel and the discrimination stemming from it deprived appellant of his fifth and sixth amendment rights to conflict-free counsel and effective representation, and essentially for the reasons given in the opinion of the district court, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/SEITZ
Chief Judge

ATTEST:

s/S.M.
Sally Mrvos, Clerk

DATED: July 18, 1983

*Joseph S. Lord, III, Judge of the United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5624

UNITED STATES OF AMERICA

v.

GABRIEL BRIGUGLIO,

Appellant

(Criminal No. 79-72-04 - D.N.J. - Newark)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and LORD, District Judge.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz,
Chief Judge

DATED: August 17, 1983

*Joseph S. Lord, III, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. A-269

GABRIEL BRIGUGLIO,

Petitioner,

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITITON FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1983.

s/William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of October, 1983.

APPENDIX B

CONSTITUTION

Amend. 5

AMENDMENT V-CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

CONSTITUTION

Amend. 6

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.